In the Supreme Court of the United States

OCTOBER TERM, 1968

No. 1221

JOHN C. BARNETT AND LEE FRED MCINTURFF,
PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App.) is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on March 7, 1969. The petition for a writ of certiorari was filed on April 1, 1969. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the search of petitioners' vehicle was lawful.

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2. Whether the evidence was sufficient to support the conviction of petitioner McInturff.

STATEMENT

After a nonjury trial in the United States District Court for the Eastern District of Tennessee, petitioners were convicted of possession (Count 1) and transportation (Count 2) of untaxed liquor, in violation of 26 U.S.C. 5205(a)(2) and 5604(a)(1). On January 5, 1968, petitioner Barnett was sentenced to five years' imprisonment on Count 1 and five years' probation on Count 2, to run consecutively; petitioner McInturff was sentenced to one year's imprisonment on Count 1 and two years' probation on Count 2, to run consecutively. The court of appeals affirmed the convictions, but it found the counts overlapping and directed the district court to expunge the sentences imposed on Count 2 (Pet. App. 12–24).

The evidence showed that at 6:15 p.m., on February 23, 1967, Agent James R. Beeler of the Treasury Department's Alcohol and Tobacco Tax Division was told by an unnamed informer in Johnson City, Tennessee, that petitioners would be delivering moonshine whiskey to their customers later that evening (Tr. 6). The informer stated that petitioners would use a 1959 white and blue two-door Chevrolet driven by Barnett, and that the delivery to one of the customers, Willard Cook (a known bootlegger who resided on Red Row, a dead-end street on which were situated a number of establishments known to be trafficking in moonshine whiskey), would take place at 8:15 p.m. (Tr. 6–7). This informer had given information on three occa-

sions to Agent Beeler that had proved to be accurate, although no convictions had been obtained therefrom (Tr. 5).

Agent Beeler was familiar with petitioners' reputation and their prior record of liquor violations (Tr. 7). After an unsuccessful effort to contact a United States Commissioner (Tr. 9), Beeler made plans for a surveillance of the Red Row area. At approximately 7 p.m., Beeler and Agent Rhea took up positions in a field near Cook's establishment on Red Row, while other agents and county and city police officers waited in parked cars on nearby streets. At 8:15 p.m. petitioners, with Barnett driving, entered Red Row in a car which fitted the description given by the informer. The car's headlights were turned off as it drove down the street and stopped at Cook's residence. Petitioner McInturff removed something from the trunk and proceeded into Cook's house through a rear door. As McInturff passed near a light, agent Rhea saw that he was carrying two one-gallon jugs, of the kind customarily used by moonshiners, apparently containing a clear liquid (Tr. 15, 60, 63). About two minutes later, McInturff left Cook's house empty-handed and entered the vehicle. The car immediately drove away, keeping its lights off for several hundred yards (Tr. 87).

Beeler relayed this information to the officers in the automobiles. They followed petitioners' car for a few blocks and then forced it to stop. Beeler arrived at the scene in a few moments and asked Barnett for the key to the trunk of his car. Barnett declined, saying, "No, Red [Beeler], I won't give you the keys because if

I give you the key, that would be giving you permission to search my vehicle, and I am not giving you my permission to search." Beeler replied, "J.C., that is perfectly all right" (Tr. 17-18). The agents commenced their search without Barnett's consent as petitioners were being removed to jail. In the back of the car they uncovered several paper bags and a carton used to carry four one-gallon jugs (Tr. 18). Using an ax handle, the agents pried open the trunk, and found a one-gallon jug containing untaxed liquor (Tr. 18).

ARGUMENT

1. Petitioners' challenge to the holdings below that there was probable cause for the arrest and search is fully answered by this Court's decisions in *Draper* v. *United States,* 358 U.S. 307, and *McCray* v. *Illinois,* 386 U.S. 300. In *Draper,* an informer of proven reliability told an agent that Draper had been selling narcotics, and that he had gone to Chicago to obtain heroin and would return with the heroin by train on one of two specified days; the informer also described Draper's clothing and physical characteristics. Draper's warrantless arrest upon his arrival at the train station as the informer had advised was held to have been made with probable cause. In *McCray,* an informer, also shown to have been reliable in the past, told police that the defendant could be found at a stated place, carrying and selling narcotics. The Court sustained McCray's warrantless arrest at the indicated place on the basis of that information.

In the present case, agent Beeler had received re-

liable information from the confidential informer several times. On this occasion some of the informer's disclosures coincided with information already known to Beeler. As the trial judge observed, the totality of the matters known and the information received was such that if Beeler "hadn't acted upon it, he would have been derelict in his duty" (Tr. 76). In addition, the circumstances observed by Beeler and his fellow officers corroborated the informer's report, and, combined with their knowledge of the suspects, the area, and the nature of local moonshine whiskey operations, provided ample reason to arrest petitioners (Pet. App. 18–19 n. 6). The extensive details of the informer's report, as well as the corroborating evidence of petitioners' abnormal activity, distinguish this case from *Spinelli* v. *United States,* 393 U.S. 410, and *Beck* v. *Ohio,* 379 U.S. 89. See *Jones* v. *United States,* 362 U.S. 257, 271; *Gilbert* v. *United States,* 366 F. 2d 923, 930–931 (C.A. 9), certiorari denied, 388 U.S. 922; *United States* v. *Cleaver,* 402 F. 2d 148 (C.A. 9), certiorari denied April 7, 1969 (No. 1138 Misc., this Term).

Since there was probable cause to believe that contraband liquor was in the automobile (see Pet. App. 18–19 n. 6), the officers had an independent right to search the vehicle, irrespective of the right to arrest the occupants. *Carroll* v. *United States,* 267 U.S. 132, 149; *Husty* v. *United States,* 282 U.S. 694; *Scher* v. *United States,* 305 U.S. 251; *Brinegar* v. *United States,* 338 U.S. 160; *Henry* v. *United States,* 361 U.S. 98. Moreover, in this case the search was at the place of arrest and reasonably incident thereto.

2. The evidence fully supports the conviction of petitioner McInturff. He accompanied Barnett in their jointly operated delivery route. After Barnett drove his car in a suspicious manner down Red Row to Cook's establishment, McInturff removed from the trunk two glass jugs which apparently contained a clear liquid. A few minutes later, the arresting officers found that a similar jug remaining in the trunk of Barnett's car contained untaxed liquor. In all the circumstances, including evidence that liquor law violators customarily use such jugs in their operations, the court, as trier of fact, could reasonably infer that McInturff knew of their contents.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.
WILL WILSON,
Assistant Attorney General.
BEATRICE ROSENBERG,
MERVYN HAMBURG,
Attorneys.

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